Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

KEITH G. GERRISH,

Petitioner,

VS.

COUNTY OF GENESEE, New York,
GARY T. MAHA, Sheriff for Genesee County,
LAWRENCE FRIEDMAN, Genesee County District Attorney,
WILLIAM G. ZICKL, Assistant District Attorney,
EDWARD E. VLACK, Deputy Sheriff,
WILLIAM FERRANDO, Deputy Sheriff,
NATHAN BALDUF, Deputy Sheriff, and
BERNARD J. RONAN, Town Justice, Town of Batavia,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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53 pp

QUESTIONS PRESENTED

1) Whether the U.S. Court of Appeals has sanctioned a departure by the Western District of New York so far from the accepted and usual course of judicial proceedings as to call for an exercise of The Supreme Court's supervisory power.

2) Whether the U.S. Court of Appeals has decided an important federal question in a way that conflicts with The New York State Court of Appeals.

3) Whether the U.S. Court of Appeals has decided important federal questions in a way that conflicts with relevant decisions of The Supreme Court.

4) Whether the Courts below have improperly stated a principle of law that all judges have absolute immunity from civil liability for actions taken in bad faith from the bench, or whether absolute judicial immunity extends only to judges presiding over courts of superior or general jurisdiction and to courts of record.*

5) Whether a prosecutor has absolute immunity from civil liability for actions taken in bad faith during an ex parte proceeding intended to circumvent a statutorily mandated probable cause proceeding, and whether a district attorney has absolute immunity from claims regarding the administration of his department.*

6) Whether respondent County of Genesee will be encouraged to continue routinely disregarding the laws of the State of New York and the United States of America as a means of self insurance risk management.*

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* Only questions 1, 2 and 3 were posted in the original Petition filed on March 1, 2000. Questions 4, 5 and 6 are fairly included lesser questions now expressly presented to offer further insight into this case. There are numerous other fairly included lesser questions, which are not expressly stated herein. Other than for the additional questions presented on this page, the inclusion of the Appendix in the Petition, and a few minor corrections to typographical errors, this document is identical to the original filing on March 1, 2000.

LIST OF PARTIES

Petitioner/plaintiff Keith G. Gerrish is an individual citizen of the United States and of the State of New York.

Respondent/defendant County of Genesee is a municipal corporation in the State of New York. Respondents/defendants Gary T. Maha, Lawrence Friedman, William G. Zickl, Edward E. Vlack, William Ferrando, and Nathan Balduf are all employees of the County of Genesee in the capacity indicated on the cover of this petition. This lawsuit is undertaken against them in both their official and individual capacities.

Respondent/defendant Bernard J. Ronan is employed as a Town Justice by the Town of Batavia. This lawsuit is undertaken against him in both his official and individual capacities.

The Town of Batavia is a political subdivision of the County of Genesee and was a defendant in the original proceedings in the District Court. However, upon appeal to the United States Court of Appeals for the Second Circuit, the plaintiff accepted the District Court's finding that there was no cause of action against the Town of Batavia and the Town took no active part in the appeal. Pursuant to Supreme Court Rule 12.6, the petitioner has notified the Clerk of this Court that the Town of Batavia has no interest in the outcome of this petition.

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The Summary Order opinion of the Court of Appeals is not published in the Federal Reporter. (App. 23)[1] The relevant Decisions and Orders (App. 1, App. 17, App. 19 and App. 26) of the District Court are also unreported.

JURISDICTION

The Court of Appeals entered its judgement on September 20, 1999. (App. 23) The petitioner timely moved for rehearing, which was denied on December 2, 1999. (App. 24) This petition has been timely filed within the 90 day period allowed by Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides:

> **Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech , or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.**
> U.S. Const. Amend. I.

The Fourth Amendment to the United States Constitution provides:

> **The right of the people to be secure in their persons, houses, papers and effects against unreasonable**

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[1] The designation App. X, where X is a numeral, refers to a page number in the petitioner's Appendix. The Appendix is bound with the Petition at the end of the document.

> **searches and seizures, shall not be violated, and no Warrants shall issue, but on probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.**
> U.S. Const. Amend. IV.

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides:

> **All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**
> U.S. Const. Amend. XIV §1.

Title 42, Section 1983, of the United States Code provides:

> **Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the**

District of Columbia.
42 USC §1983.

Article I, Section 3 of the New York State Constitution provides:

> **The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.**
> NYS Const. Art. I §3.

Article I, Section 11 of the New York State Constitution provides:

> **No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.**
> NYS Const. Art I §11.

Article I, Section 14 of the New York Constitution provides:

> **Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, and the resolutions of the congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred seventy-seven, which have not since expired, or been repealed or altered, and such acts of the legislature of this state as are now in force, shall be and continue to**

be the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated.
NYS Const. Art. 1 §14.

STATEMENT OF THE CASE

I. Proceedings Below

The petitioner, Keith G. Gerrish, is a United States citizen by birth and resides in Genesee County, New York. In his Complaint, the petitioner/plaintiff accused the respondents/defendants of various violations of his rights secured under the First, Fourth and Fourteenth Amendments to the Constitution, invoking the jurisdiction of the District Court under 28 USC §1331 for redress pursuant to 42 USC §1983.

The questions presented here arise from the petitioner's complaints that without probable cause he was falsely arrested and maliciously prosecuted for aggravated harassment (the allegedly harassing statements were in written form) based on charges known to be false by respondents Deputy Sheriff Vlack, Assistant District Attorney Zickl, and Town Justice Ronan. The criminal proceedings ultimately terminated in the petitioner's favor and on July 27, 1998, he subsequently filed a civil Complaint in the United States District Court for the Western District of New York.

Of the twenty five Counts originally pleaded against the respondents, the proceedings below have orderly and legitimately rendered only five as failing to state claims upon which relief can be granted. However, the questions presented here arise from the failure of the lower Courts to formally acknowledge the existence of numerous principles of law previously established in both this Court, and in the Court of Appeals below, which firmly support the conclusion that the remaining twenty Counts of the Complaint do state claims upon which relief can be granted. Of the twenty

counts at issue, three plead facts against respondent Deputy Vlack for malicious prosecution, libel and a claim under 42 USC §1983. Two counts are pleaded against respondent Deputies Ferrando and Balduf based a non-malicious false arrest and a corresponding claim under 42 USC §1983. Two counts are pleaded against respondent District Attorney Zickl; one is for abuse of process, and the other is a corresponding claim under 42 USC §1983. Ten counts are pleaded against respondent Town Justice Ronan; five are for abuses of process, and the other five are corresponding 42 USC §1983 claims. For negligent supervision of their respective Departments, one count is pleaded against respondent Sheriff Maha and one count is pleaded against respondent District Attorney Friedman. Under 42 USC §1983, one count is pleaded against respondent County of Genesee for the administration of a local self insurance law in a manner that is deliberately indifferent to the civil rights of citizens by encouraging the concealment of police misconduct.

Upon filing the Complaint in the District Court, the petitioner applied for permission to proceed as a poor person, and the application was granted (App. 1). However, the Court (Skretny, J.) unjustly used the granting of forma pauperis status as a guise to dismiss the Complaint in its entirety under 28 USC §1915(e)(2)(B) with a statement that "plaintiff's claims are based on indisputably baseless legal theories." (App. 3, Decision and Order) As set forth herein, the vast majority of the plaintiff's claims were well founded on legal theories highly endorsed by this Court.

In a subsequent Decision and Order (App. 17, dated October 21, 1998, and entered October 23, 1998), the District Court (Arcara, J.) even went so far as to falsely claim that its own staff had erroneously issued the summonses (App. 17) and falsely stated that an action is not properly commenced until either the filing fee has been paid or an application to proceed in forma pauperis has been approved.[2]

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[2] Local Rule of Civil Procedure ("LRCP") 5.6(b) provides as follows: **"Pursuant to 28 USC §1915, the Court may authorize the commencement, prosecution or defense of any action or appeal**

In response to a FRCP 60(b) motion for reconsideration by the petitioner/plaintiff, coupled with a FRCP 4(d)[3] motion for costs

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therefrom without prepayment of fees, costs or security therefor by a person who is unable to pay such fees, costs or security in accordance with Local Rule of Civil Procedure 5.3(c)." And, LRCP 5.3(c) states as follows: **"An indigent pro se plaintiff or petitioner (28 USC §2254) may seek in forma pauperis status to file his or her action or proceeding without payment of fees by filing the form affidavit available in the Clerk's office, along with the complaint/petition. The case will be given a civil docket number and the in forma pauperis application will be submitted to a Judge of the Court. If the Judge denies in forma pauperis status, the plaintiff/petitioner will by written order be given notice that the case will be dismissed if the fee is not paid within twenty (20) days."** Moreover, pursuant to FRCP 3, **"A civil action is commenced by filing a complaint with the court."** Therefore, the action was properly commenced by merely filing the complaint with the court and it was not necessary for any judge to expressly approve of anything for the action to proceed. The Court's authorization to proceed is in the language of the Local Rules, and the authorization is removed by a Court order that **"the case will be dismissed if the fee is not paid within twenty (20) days."** Furthermore, FRCP 4(b) provides: **"Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant."** Therefore, the clerk had no other lawful choice than to issue the summonses to the plaintiff and made absolutely no error in doing such.

[3] In pertinent part, FRCP 4(d)(2) provides: **"An individual, corporation, or association that is subject to service under subdivision (e) , (f) , or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. ..."** The statute then goes on to specify the procedure for notification and request for waiver. The forms provided by the District Court even provide a clear warning of the penalty for failure to waive service.

for service of the summonses upon the individual respondents/defendants, the proceedings became so prejudicially tainted and disorderly that the District Court (Skretny, J.) even refused to assess the mandatory statutory costs against the individual defendants who failed to comply with the petitioner's properly made requests to waive service of the summonses.[4]

On December 3, 1998, the petitioner/plaintiff responded with a Plaintiff's Motion, With Notice, Under Rule 60(b) To Set Aside Orders And Judgement For Fraud Upon The Court By A United States District Judge. However, the District Court (Arcara, J.) did not respond to that motion until September 28, 1999, (App. 26)

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[4] In denying petitioner's motion for costs for serving the summonses, Judge Skretny states, "Accordingly, plaintiff is not entitled to the reimbursement of his expenses pursuant to Rule 54(d). The Court finds no other authority for its awarding costs to a losing plaintiff, and therefore plaintiff's motion for costs is denied." (Decision And Order, App. 20) However, the motion was made pursuant to FRCP 4(d), which allows plaintiff to recover the costs for service of a summons where a defendant has failed to comply with an appropriately made request to waive service of summons. Moreover, the District Court's own forms and the language therein warns a defendant of the financial consequences for failure to comply with a request to waive service of summons. The language in the U.S.C.A. 1998 Cumulative Annual Pocket Part for Rules 1 - 11, in the Supplementary Practice Commentaries for Rule 4(d)) by David D. Seigel, C4-14, at page 57 states: "The duty imposed on a defendant who receives a waiver request is 'to avoid unnecessary costs of serving the summons.' If the defendant responds to the request and sends the waiver back, the plaintiff is spared those costs. If the defendant doesn't, and the plaintiff has to effect service by formal means, the costs of service may be imposed on the defendant, and that is so no matter which way the case may go on the merits." [underline added] Moreover in Double S Truck Line, Inc. v Frozen Food Exp., 171 FRD 251 (D.Minn. 1997), the Court held that "... the commentary to Rule 4(d) makes abundantly clear that a defendant's duty to avoid unnecessary costs of service is not related to the merits of the underlying case and, therefore, there is no cause to delay an award of costs even when, as the Defendant here alleges, the Plaintiff's claim is supposedly without merit."

which was shortly after the Court of Appeals issued an Order (App. 23) on September 20, 1999, affirming the District Court's findings. In the District Court Order (App. 26), the motion was declared moot on the basis of the Court of Appeals Order (App. 23). Those Orders stand in sharp contrast to the Court of Appeals Order (App. 22) by Staff Attorney Michael S. Zachary which granted the petitioner's request that the Appeal be expedited on the grounds that there had been fraud upon the Court by a Judge.[5]

The petitioner responded to the Summary Order of the Court of Appeals by requesting a rehearing on October 2, 1999, and that request was denied in an Order (App. 28) issued on December 2, 1999. This Petition for a Writ of Certiorari seeks an orderly disposition of these matters under the rule of law, because the Courts below have failed to acknowledge that this petitioner has properly invoked the jurisdiction of the District Court and this Court has held that each and every person who properly invokes the jurisdiction of a Federal Court is entitled to an orderly disposition of their claims. *William Jefferson Clinton v. Paula Corbin Jones*, 520 US 681 (1997).

II. Relevant Background Facts

Over a two year period prior to the petitioner's arrest[6] on July 25, 1997, he witnessed numerous incidents of criminal domestic abuse perpetrated by a man ("John Doe") upon his spouse ("Jane Doe") who works as a waitress at a local restaurant frequented by the petitioner. Over that two year period, the petitioner also developed a friendship with Jane Doe and a corresponding concern for her safety and the safety of the couple's three minor age children. The concern for their safety grew as the petitioner gradually learned

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[5] While the Order granting an expedited Appeal does not refer to the Rule 60(b) Motion for fraud upon the Court, the request was made exclusively on that basis and the Rule 60(b) Motion expressly was cited.

[6] While the petitioner has been legitimately ticketed for occasional speeding and inspection sticker violations over his 53 year life span, he has an otherwise impeccably clean criminal record.

about the couple's stormy relationship from things he had personally witnessed and from stories told him by Jane Doe, her coworkers, and friends.

John Doe had a reputation for being extremely jealous of his spouse's relationships, and he engaged in jealous rants on several occasions including severely damaging Jane Doe's vehicle. He routinely threatened anybody he thought might be having an affair with his spouse and he threatened in a veiled fashion to use the petitioner for high power rifle and bow and arrow practice. Other people he plainly told he would blow their heads off.

John Doe was frequently unemployed; and, at the peak of the domestic abuse cycles, he extended his bullying tactics to keeping Jane Doe under virtually continual surveillance. He controlled her whereabouts with threats of violence to her, the people she associated with, their children, and himself. John Doe's surveillance system included the assistance of his brother (convicted of vehicular assault), who frequently escorted Jane Doe against her wishes as she went about her daily domestic activities. He would go into the restaurant around Jane Doe's quitting time to supervise her leaving and would phone Mr. Doe with the departure information.

There was also an occurrence of Jane Doe being locked out of her home for several days. She was so fearful of her husband and his influence with the police that she backed out of an appointment she made with the petitioner to go to the local law enforcement authorities regarding the incident. This was the second time that the petitioner offered assistance to Jane Doe in resolving the problem, and her reluctance to take the matter to the authorities caused the petitioner to refrain from pursuing the matter any farther. Despite the petitioner's strong temptation to discuss the matters with Mr. Doe, he finally resolved that he would let the matter go and make no more offers to help and would stay clear of the Doe's domestic disputes unless requested by Jane Doe or unless John Doe did something to involve him - which ultimately became the case.

Starting at the age of 14 with the clairsentient experience of his grandfather's death, the petitioner has had numerous occurrences of what are commonly called psychic experiences in which he believes to have been supernaturally endowed with knowledge of remote or future events - such as when someone is presently in trouble or in the near future is going to die. In many Christian sects these phenomena are believed to be Gifts of the Holy Spirit commonly referred to as the Word of Knowledge or the Gift of Prophesy. (Holy Bible, 1 Corinthians 12:8 and 12:10) Over the two years that the petitioner knew Jane Doe, he had more psychic experiences involving her than anyone else in his life, and on two particular occasions he was given to know that Jane Doe was experiencing extreme emotional distress and fear. One experience was associated with her being stranded at a remote off-road location with two companions under adverse weather conditions and led to their being spared a significant amount of discomfort. The other experience occurred about two weeks prior to the petitioner's arrest and alerted the petitioner to the fact that John Doe was again in the process of secretly and skillfully terrorizing his spouse. This fact was validated when the petitioner went into the restaurant to see if he might gain some insight to his psychic experience and discovered that John Doe was again stalking and placing his spouse under surveillance. Apparently after seeing the petitioner at the restaurant, John Doe must have falsely concluded in his jealous stupor that Jane Doe and the petitioner were having an affair, and he started stalking the petitioner and placing his residence under surveillance and harassed him with a noisy display of reckless driving. In response to John Doe's attempts to intimidate the petitioner, the petitioner decided to deal with Mr. Doe in writing so that there would be an accurate record of the exact words which were communicated and nobody could successfully distort the truth about just exactly what was said.

Since it is the petitioner's solemn religious belief that we are all in The Court Of The Living And Almighty God at each and every moment of our lives, and since it is also the petitioner's solemn religious belief that he was supernaturally endowed by Almighty God with knowledge that Jane Doe and her children were in danger of harm from Mr. Doe, and since the petitioner has a

responsibility to Mr. Doe as a fellow Christian to privately express his grievances (Holy Bible, Matthew 18:15-17) before taking them elsewhere, the petitioner spent 10 days carefully drafting a set of papers resembling traditional court paperwork but bearing the phrase COURT OF THE LIVING AND ALMIGHTY GOD. In the paperwork, the petitioner referred to himself as a minister of Justice and qualified Justice as Truth and not as any act of vengeance or retribution. The petitioner expressly denied being anybody's judge and expressed the belief that there is only one true Judge and His Name is Almighty God.

The papers presented to Mr. Doe complained of his behavior and cited several sections of the New York Penal Law which he was violating during his jealous rages. The language of the documents does not threaten to do any unlawful act and none of the proceedings below have shown there to be any threats to do an illegal act. While the papers may have been annoying to Mr. Doe, there is nothing in our laws making it illegal to annoy a person who is actively engaging in criminal acts. And, when I came to the reality that I was the person being charged with committing a crime while the true criminal was strutting about unscathed, I came to understand just how much improper influence that Mr. Doe has with local law enforcement officials and why Mrs. Doe was so reluctant to go to them when she had been locked out of her own home.

In response to receiving the documentation, Mr. Doe went to respondent Deputy Sheriff Vlack who assisted him in making out the petitioner to be the stalker and the true criminal was portrayed as the victim. It also turned out that the respondent Assistant District Attorney who prosecuted the case is a friend of John Doe's. Moreover, so far, nobody in law enforcement has acknowledged the obvious fact that the paperwork issued by the petitioner which was attached to the Misdemeanor Complaint by Deputy Vlack simply did not support the accusations he made and that the petitioner was charged with paperwork insufficient on its face to support the accusations and that the petitioner was correspondingly arrested and prosecuted without probable cause in violation of his Fourth Amendment rights.

So far, nobody has explained why there was never any warrant issued for the arrest, but instead the Complaint and Supporting Deposition were given to respondent Deputies Ferrando and Balduf who never read the content of the paperwork for which plaintiff was arrested until after they had placed the plaintiff under arrest. Deputy Ferrando was quite amused by the wording and complimented the petitioner several times on how well it was written.

Nor has anybody yet explained why the respondent Town Justice Ronan failed to provide the probable cause hearing mandated by New York Criminal Procedure Law ("CPL") §140.45 and which was enacted in response to this Court's finding in *Gerstein v. Pugh*, 420 US 103, 43 LEd2d 54 that a probable cause hearing is necessary before any post-arrest restraint on liberty can be imposed. Without there ever having been a trial or a plea to the charges, the respondent Town Justice upon arraignment issued an Order holding that the petitioner had been convicted of aggravated harassment and ordered him to stay away from the restaurant for five months, thereby imposing a significant post arrest restraint on liberty that was never reduced. The impact of that restraint was that the petitioner was unable to counter slanderous statements which Jane Doe made under coercion by John Doe claiming that she had the petitioner arrested for representing himself as a minister of God and threatening to harm her and her children. The respondents were informed of the obviously false statements being made and were well aware of the corresponding implications of on-going abuse, but they preferred to ignore the truth and continued prosecuting the petitioner until he was finally able to maneuver the Town Court into a dismissal of the charges.

Thus far, the only explanation offered by the respondents for the arrest and failed prosecution was that there was probable cause to arrest the petitioner based on the fact that he claimed to have been endowed with supernatural knowledge by Almighty God that Jane Doe was in danger. This was admitted to in a brief submitted on behalf of respondent Deputy Sheriffs. However, arresting an individual for expressing a belief regarding religious conviction,

no matter how silly or crazy it may sound, is clearly against the First Amendment so long as the act done is not inimical to the peace, good order and morals of society. It is likewise expressly against the Bill of Rights for the New York Constitution (Article I, Section 3) and the failure for government to provide equal protection to all citizens of those Rights is in violation of the Fourteenth Amendment.

The relevant facts are also that the petitioner was a witness to an assault by two Deputies on a disabled person about a year prior to his arrest, and a successful criminal conviction based on the petitioner's uncommon religious beliefs would have gone a long way to impeach him as a witness in regard to the civil litigation which resulted from that debacle. Other relevant facts include a self-insurance law which was enacted and is administered with deliberate indifference to its impact on the Constitutional rights of Genesee County citizens because it encourages the cover up of police misconduct.

REASONS FOR GRANTING THE PETITION

I. The U.S. Court of Appeals Has Sanctioned A Departure By The Western District of New York So Far From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of The Supreme Court's Supervisory Power.

Without ever requiring the respondents to pay the mandatory statutory costs for failure to waive service of the summonses, and by declaring that any more was required to commence the proceedings than to file the Complaint pursuant to FRCP 3 and LRCP 5.3(c) and 5.6(b), the District Court significantly departed not only from the written accepted and usual course of judicial proceedings, but also from the most basic standard governing judicial conduct - the standard that we are all equal under the law and are entitled to equal treatment in our courts. On the one hand, the Court of Appeals granted the petitioner an expedited appeal on

the grounds that there had been fraud upon the Court by a United States Judge, and on the other hand that same Court contradictorily upheld the fraudulent findings of the District Court which were replete with intentional misrepresentations of both fact and law. If the Supreme Court of the United States of America finds those proceedings to be anywhere near the realm of respectable or honorable or usual or acceptable, then this great Country is truly in very serious trouble. As set forth in the matter of *William Jefferson Clinton v. Paula Corbin Jones*, 520 US 681 (1998), even a citizen who sues a sitting President of the United States is entitled to an orderly disposition of their claim so long as they have properly invoked the jurisdiction of a United States District Court. In the instant matter, the record shows that the jurisdiction of the Western District of New York was properly invoked. Therefore, the question remains as to just who any of these respondents are that they should have more immunity than a sitting President of the United States?

II. The U.S. Court of Appeals Has Decided An Important Federal Question In A Way That Conflicts With The New York State Court of Appeals

In regard to the issue of judicial immunity from civil liability for Town Justice Ronan, the lower Courts have held that he is absolutely immune from liability for judicial actions whether taken in bad faith or not. However, this posture conflicts strongly with the New York Court of Appeals decision in the matter of *Dean v. Kochendorfer*, 237 NY 384 (1924), in which a magistrate was held liable for abuse of process, which is the basis of all of the claims against respondent Ronan. This case has been frequently cited in regard to principles of abuse of process. Moreover, in *Lange v. Benedict*, 73 NY 12 (1878) as argued in greater detail in the proceedings below, New York adopted the principles set forth in *Bradley v. Fisher*, 13 Wall 335, 20 LEd 646 (1872) which exempts only judges of courts of record or general or superior jurisdiction from civil liability for all judicial actions and applied them to a United States Judge. In 1891, in the matter of *Austin v. Vrooman*, 128 NY 229, the New York Court of Appeals conferred only

qualified immunity on a justice of the peace and did not cite either *Lange* or *Bradley* in affirming nonsuit for judicial errors made in good faith. Therefore, *Austin* and *Dean* make it clear that all judges are not immune for actions taken in bad faith and respondent Town Justice Ronan is entitled only to qualified good faith immunity since he presides over a court not of record and of limited jurisdiction.

III. The U.S. Court of Appeals Has Decided Important Federal Questions In A Way That Conflicts With Relevant Decisions Of The Supreme Court

In regard to the issue of absolute immunity for Town Justice Ronan, the Courts below have insisted upon misrepresenting the language of *Bradley v. Fisher*, 13 Wall 335, 20 LEd 646 (1872) and *Stump v. Sparkman*, 435 US 439 (1978) by claiming that they confer absolute immunity on all judges rather than on only judges of courts of record and general or superior jurisdiction. Town Justice Ronan is not a judge in those types of courts and therefore is not entitled to absolute immunity under the law as mandated many years ago by this Court.

In regard to the issue of prosecutorial immunity and the impact on the claims against ADA Zickl for abuse of process and against District Attorney Friedman for negligence in the management of his Department, and to the extent that the panel decision affirms the judgement and orders of the District Court for substantially the same reasons set forth in its order of dismissal, the panel decision is contrary to the United States Supreme Court decisions for *Buckley v. Fitzsimmons*, 509 US 259, 125 LEd2d 209 (1993), *Burns v. Reed*, 500 US 478 (1991), *Westfall v. Erwin*, 484 US 292, 296 (1988), *Forrester v. White*, 484 US 219, 224 (1988), *Malley v. Briggs*, 475 US 335, 342-343 (1986), *Mitchell v. Forsyth*, 472 US 511, 520-523 (1985), *Briscoe v. LaHue*, 460 US 325 (1983), *Harlow v. Fitzgerald*, 457 US 800 (1982), *Butz v. Economou*, 438 US 478 (1978), and *Imbler v. Pachtman*, 424 US 409 (1976) which do not extend absolute immunity to activities not intimately associated with the judicial phase of the criminal process. The

record shows that respondent ADA Zickl engaged in an unlawful ex parte proceeding in order to avoid a probable cause proceeding which would have granted him the absolute immunity that he now seeks for procuring an order of protection intended to restrict the freedom of petitioner's speech in regard to communicating with Jane Doe so he could unlawfully convict the petitioner for a crime he did not commit. He stepped out from behind his cloak of immunity and this Court should require him to face the lawful consequences of his unlawful actions.

CONCLUSION

The petitioner apologizes for presenting to this prestigious Court what is probably the most poorly authored document in these proceedings. However, a recently acquired electronics engineering job with a good company has required such an amount of time that this paper could not be given the same attention as the others. Please do something to correct this atrocity to American Justice and make these respondents accountable for the truth, because that is simply what America is supposed to be all about.

Respectfully submitted,

Keith G. Gerrish
Petitioner *pro se*
1 Allen Street
Batavia, New York 14020
(716) 343-4022

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

KEITH G. GERRISH,

Plaintiff,

- v -

COUNTY OF GENESEE, NEW YORK;
GARY T. MAHA, Sheriff for Genesee County;
LAWRENCE FRIEDEMAN, Genesee County District Attorney;
WILLIAM G. ZICKL, Assistant District Attorney;
EDWARD E. VLACK, Deputy Sheriff;
WILLIAM FERRANDO Deputy Sheriff;
NATHAN BALDUF, Deputy Sheriff;
BERNARD J. RONAN, Town Justice, Town of Batavia; and
THE TOWN OF BATAVIA, NEW YORK;

Defendants.

DECISION AND ORDER
98-CV-0468A(M)
Filed: October 13, 1998
Entered: October 14, 1998

SKRETNY, District Judge:

INTRODUCTION

Plaintiff Keith Gerrish, proceeding *pro se*, has filed this 102-page, twenty-five count complaint seeking relief under 42 U.S.C. § 1983 (Docket # 1) and has requested permission to proceed *in forma pauperis* (Docket # 2). Plaintiff's multiple claims are predicated on theories of false arrest, malicious prosecution, malicious abuse of process, intentional infliction of emotional distress, conspiracy to

engage in tortious conduct and violations of plaintiff's federal constitutional rights. For the reasons discussed below, plaintiff's request to proceed as a poor person is granted and the complaint is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B).

PLAINTIFF'S ALLEGATIONS

In January of 1995, plaintiff allegedly wrote to a New York State Supreme Court Justice requesting leniency in a friend's sentencing. Plaintiff's letter criticized the conduct of the Genesee County Sheriff's Department ("Sheriff's Department") and defendant Zicki, the Assistant District Attorney ("A.D.A.") who prosecuted his friend. On June 28, 1 996, plaintiff allegedly witnessed members of the Sheriff's Department assault his landlord; plaintiff complained to defendant A.D.A. Zicki about the conduct of the officers and spoke to an Investigator Krautz about the matter. Plaintiff also alleges that he was walking along a road after midnight on May 9, 1997, when a Sheriff's Department cruiser "menaced" him. Complaint, Background Facts, ¶ 21. Plaintiff made no complaint to anyone about this incident.

On July 25, 1997, an accusatory instrument was signed by defendant Deputy Sheriff Vlack, based on stalking and harassment complaints made by individuals identified by plaintiff as John and Jane Doe ("the Does"). As a result of this accusatory instrument, plaintiff was arrested and held for approximately one hour before he was released on his own recognizance by defendant Judge Ronan, who also issued an Order of Protection prohibiting plaintiff from having contact with the Does. Plaintiff subsequently appeared before Judge Ronan five times. On January 19, 1998, Judge Ronan dismissed the charges against plaintiff pursuant to New York Criminal Procedure Law § 210.40(l), which provides for the dismissal of an indictment in furtherance of justice. Plaintiff seeks compensatory and punitive damages.

DISCUSSION

Plaintiff has met the statutory requirements of 28 U.S.C. § 1915(a). Therefore, plaintiff is granted permission to proceed in forma pauperis.

Section 1915 mandates that when the court *grants in forma pauperis* status it also must conduct an initial review of the action to ensure that it goes forward only if it meets certain qualifications. The review of plaintiff's complaint demonstrates that plaintiff's claims are based on indisputably baseless legal theories. As a result, this action is subject to dismissal under 28 U.S.C. § 1 91 5(e)(2)(B). Neitzke v. Williams, 490 U.S. 319, 327, 109 S.Ct. 1827, 1833, 104 L.Ed.2d 338 (1989).

Plaintiff brings this action pursuant to 42 U.S.C. § 1983. In order to state a claim under § 1983, a plaintiff must allege: (1) that the challenged conduct was attributable at least in part to a person acting under color of state law; and (2) that such conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. Dwares v. City of New York, 985 F.2d 94, 98 (2d Cir. 1993).

The Fourth Amendment Claims

Plaintiff alleges that the defendants violated his Fourth Amendment rights by falsely arresting, maliciously prosecuting, and maliciously using process against him. Under New York law, a plaintiff claiming false arrest must show, inter alia, that the defendant intentionally confined him without his consent and without being privileged to do so, *see, e.g.*, Broughton v. State, 37 N.Y.2d 451, 456, 373 N.Y.S.2d 87, 93, 335 N.E.2d 310, 313-14, *cert. denied sub nom.*, Schanberger v. Kelloqq, 423 U.S. 929, 96 S.Ct. 277, 46 L.Ed.2d 257 (1975), and a § 1983 claim for false arrest requires "substantially the same," Posr v. Doherty, 944 F.2d 91, 96 (2d Cir. 1991). The existence of probable cause gives an officer the privilege to arrest and "is a complete defense to an action for false arrest." Bernard v. United States, 25 F.3d 98 102

(2d Cir. 1994). Morever, in order " [t]o prevail on a malicious prosecution claim under either New York law or § 1983, a plaintiff must show that the defendant maliciously commenced or continued against the plaintiff a criminal proceeding that ended in the plaintiff's favor, and that there was no probable cause for the proceeding." Marshal v. Sullivan, 105 F.3d 47, 50 (2d Cir. 1996), *citing* Posr v. Doherty, 944 F.2d at 100. Thus, the existence of probable cause at the time of plaintiff's arrest and prosecution is a complete defense to both claims. Because the Court finds that probable cause clearly existed when plaintiff was arrested and prosecuted, his current claims must fail.

"Probable cause to arrest exists when officers have knowledge of, or reasonably trustworthy information about, facts and circumstances sufficient to warrant a person of reasonable caution to believe that an offense has been committed or is being committed by the person to be arrested." Johnson v. City of New York, 940 F.Supp. 631, 636 (S.D.N.Y. 1996), *citing* Golino v. City of New Haven, 950 F.2d 864, 870, (2d Cir. 1991), *cert. denied sub nom.* Lillis v. Golino, 505 U.S. 1221, 112 S.Ct. 3032, 120 L.Ed.2d 902 (1992). "Although an arrest cannot be based on a mere hunch ... 'a probable cause determination does not require proof beyond a reasonable doubt, it is the mere probability of criminal activity, based on the totality of circumstances, that satisfies the Fourth Amendment. '" Dale v. Kelley, 908 F.Supp. 125, 1 33 (W.D.N.Y. 1995) (citations omitted), *affd.* 95 F.3d 2 (2d Cir. 1996). "Indeed, the eventual disposition of the criminal charges is irrelevant to the probable cause determination." Johnston v. Town of Greece, 983 F.Supp. 348, 353 (W.D.N.Y. 1997).

In this case, plaintiff was arrested after an accusatory instrument was filed by defendant Vlack based upon a complaint made by the victims of the alleged crime. "An arresting officer advised of a crime by a person who claims to be the victim, and who has signed a complaint or information charging someone with the crime, has probable cause to effect an arrest absent circumstances that raise doubts as to the victim's veracity." Singer v. Fulton County Sheriff, 63 F.3d 110, 119 (2d Cir. 1995) *cert. denied*, 517 U.S. 1189, 116

S.Ct. 1676, 134 L.Ed.2d 779 (1996).[1] *See also* McKinney v. George, 726 F.2d I 1 83, 11 87 (7th Cir. 1 984) ("if policemen arrest a person on the basis of a private citizen's complaint that if true would justify the arrest, and they reasonably believe it is true, they cannot be held liable for a violation of the Constitution merely because it later turns out that the complaint was unfounded."); Miloslavsky v. AES Engineering Soc., 808 F.Supp. 351, 355 (S.D.N.Y. 1992) ("The veracity of citizen complaints who are the victims of the very crime they report to the police is assumed."), *aff'd.*, 993 F.2d 1534 (2d Cir. 1993), *cert. denied*, 510 U.S. 817, 114 S.Ct. 68, 126 L.Ed.2d 37 (1993).

Plaintiff was arrested for aggravated harassment in the second degree under New York Penal Law § 240.30(l), which states, in pertinent part, that

> [a] person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy or threaten or alarm another person, he or she: communicates or causes a communication to be initiated by ... mail or any other form of written communication, in a manner likely to cause annoyance or alarm.

New York Penal Law § 240.30(1) (Bender 1998). The defendants arrested plaintiff on this charge not only after they received a complaint from the Does, but after reviewing documents plaintiff acknowledges he hand-delivered to the Does documents which indicated to defendants that plaintiff was stalking and harassing the Does: plaintiff's self-titled "Order to cease Stalking and Suveillance (sic) Complaint" and "Order to Cease and Desist Stalking and Surveillance and Order of Protection." Complaint, Count 1, 1 29. These documents, written by plaintiff, purport to be

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[1] Defendant Vlack's motivation to arrest plaintiff is irrelevant to the question of probable cause. Mozzochi v. Borden, 959 F.2d 1174, 1179-80 (2d Cir. 1992). The standard is not a subjective one. Therefore, plaintiff's suspicion that his arrest was precipitated by retaliatory motives is totally irrelevant to the probable cause consideration.

issued from the "COURT OF THE LIVING AND ALMIGHTY GOD", and in them plaintiff represents himself as "a minister of Justice for the Court Of The Living and Almighty God." Complaint, Count 1, ¶¶ 60-61. The documents state that plaintiff believed God had appointed him to watch over the well-being of John Doe's wife[2] and children, ordered John Doe to immediately cease engaging in purportedly abusive behavior towards his wife and children, and threatened dire consequences to John Doe should he continue to behave in an abusive manner. Complaint, Count 1, ¶¶ 59-75.

Plaintiff claims that the defendants misinterpreted the meaning of these documents. However, even if plaintiff were correct in claiming misinterpretation of the documents, such an allegation is insufficient to show that the defendants lacked probable cause to arrest and prosecute under the described circumstances. Plaintiff's own complaint in this case demonstrates that he did deliver documents to the Does that both accused and threatened John Doe.

In any event, plaintiff has not established a favorable termination of prosecution in his favor, a necessary element to establish a cause of action for false arrest and malicious prosecution. Pinaud County of Suffolk, 52 F.3d 1139, 1154 (2d Cir. 1996) (a § 1983 plaintiff must establish termination of the prosecution in his favor under applicable state law); Roesch v. Otarola, 980 F.2d 850, 854 (2d Cir. 1992) (plaintiff's claims for malicious prosecution and false imprisonment[3] were barred because the underlying criminal proceedings did not terminate in plaintiff's favor). The charge against plaintiff was dismissed pursuant to New York Criminal Procedure Law § 210.40(l), which is a dismissal in furtherance of justice. N.Y. Crim. Proc. Law § 210.40(l) (Bender 1998). The New York Court of Appeals has held that a dismissal in the interests of justice "leaves the question of guilt or innocence

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[2] Plaintiff apparently knew or had become aware of Jane Doe because she works as a waitress in a restaurant he frequented.

[3] False arrest and false imprisonment are synonymous under New York Law. Posr v. Doherty, 944 F.2d at 96.

unanswered." Ryan v. New York Telephone Co., 62 N.Y.2d 494, 504-05, 478 N.Y.S.2d 823, 829, 467 N.E.2d 487 (1984). The Second Circuit, based upon the holding in Ryan, has held as a matter of law that a dismissal in furtherance of justice cannot provide the basis for a favorable termination. Hygh v. Jacobs, 961 F.2d 359, 367 (2d Cir. 1992); Pinaud, 52 F.3d at 1155 (a dismissal in the interests of justice is closer to a procedurally-induced gift to the defendant than a favorable termination on the merits). As plaintiff has failed to establish that he was arrested and prosecuted without probable cause and that the prosecution terminated in his favor, his Fourth Amendment claims for false arrest and malicious prosecution hereby are dismissed with prejudice.

Plaintiff also alleges that the defendants committed malicious abuse of process. However, the Second Circuit has held that malicious abuse of process will not support

a § 1983 claim. Spear v. Town of West Hartford, 954 F.2d 63, 68 2d Cir. (1992), *cert. denied*, 506 U.S. 819, 113 S.Ct. 66, 121 L.Ed.2d 33 (1992). Plaintiff's Fourth Amendment claim based upon malicious abuse of process therefore is dismissed with prejudice.

The Claims Against Defendant Ronan

Plaintiff alleges that defendant Town Justice Ronan violated his First, Sixth and Fourteenth Amendment rights by the manner in which he presided over plaintiff's prosecution. However, it is well settled that judges are absolutely immune from suit for any actions taken within the scope of their judicial responsibilities. *See e.g.*, Mireles v. Waco, 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991)

> Although unfairness and injustice to a litigant may result on occasion, "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of

personal consequences to himself."

Id. at 10, 287, quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646 (1871). The protection of immunity is not pierced by allegations that the judge acted in bad faith or with malice, Pierson v. Ray, 386 U.S. 547, 554, 87 S.Ct. 1 213, 18 L.Ed.2d 288 (1967), even though "unfairness and injustice to a litigant may result on occasion," Mireles, 502 U.S. at 9, 112 S.Ct. at 286. The United States Supreme Court has expressly applied the doctrine of judicial immunity to actions brought pursuant to 42 U.S.C. § 1983. See Pierson, 386 U.S. at 547, 87 S.Ct. at 1213.

The Supreme Court has developed a two-part test for determining whether a judge is entitled to absolute immunity. See Stump v. Sparkman, 435 U.S. 349, 360, 98 S.Ct. 1099, 1106, 55 L.Ed.2d 331 (1978). First, "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction. '" *Id.* at 356-57, 98 S.Ct. at 1105 (quoting Bradley, 80 U.S. (13 Wall.) at 351 (1871)). Second, a judge is immune only for actions performed in his judicial capacity. *Id.* at 360-63, 98 S.Ct. at 106-08; *also* Maestri v. Jutkofsky, 860 F.2d 50 (2d Cir. 1988) (finding no immunity where town justice issued arrest warrant for conduct which took place neither within nor in a town adjacent to his town, thereby acting in the absence of all jurisdiction), *cert. denied* 489 U.S. 1016, 109 S.Ct. 32, 103 L.Ed.2d 193 (1989); Gregory v. Thompson, 500 F.2d 59, 62 (9th Cir. 1974) (finding no immunity where judge assaulted litigant). Stump further distinguished between an "excess of jurisdiction" and "the clear absence of all jurisdiction over the subject matter."

> Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds,

> the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend.

Stump at 356 n. 6, 98 S.Ct. at 1104 n. 6 *(citing* Bradley, 80 U.S. at 351).

Plaintiff's allegations against defendant Ronan all relate to events that occurred within the scope of his judicial responsibilities, such as issuing protective orders, scheduling hearings, and ruling on motions. While plaintiff does allege that Judge Ronan's actions in hearing his claims and issuing two protective orders were outside the scope of his jurisdiction, his allegations are erroneous. New York Criminal Procedure Law § 10.30(l)(b) gives local criminal courts[4] concurrent jurisdiction over all misdemeanors. N.Y. Crim. Proc. Law § 10.30(l)(b) (Bender 1998). Plaintiff was charged with aggravated harassment in the second degree, a class A misdemeanor, and thus Judge Ronan had jurisdiction over his case. Further, § 530.13(l) of the New York Criminal Procedure Law allows a criminal court to issue an order of protection during the pendency of a criminal action, N.Y. Crim. Proc. Law § 530.13(l) (Bender 1998), and thus Judge Ronan's issuance of the order also was within his jurisdiction. Plaintiff's arguments that there was insufficient evidence to proceed with the prosecution and that good cause was not shown for the issuance of the protective order are irrelevant to the issues of the Town Court's subject matter jurisdiction and Judge Ronan's absolute immunity here. Because Judge Ronan is entitled to absolute immunity regarding his actions in presiding over plaintiff's prosecution, plaintiff's claims against him hereby are dismissed with prejudice.

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[4] N.Y. Crim. Proc. Law § 10.10(3)(d) states that a town court is considered a local criminal court.

The Claims Against the Town of Batavia

Plaintiff alleges that the Town of Batavia is subject to municipal liability for Judge Ronan's alleged violations of his constitutional rights. However, because the Court finds that the town court is not a municipal entity and its justice is not a municipal employee, the Town of Batavia is not liable for any alleged constitutional infraction.

Article VI of the New York State Constitution establishes a unified court system for New York, which includes the town courts. N.Y. Const. art. VI, § 1(a). Article VI also provides that the legislature may regulate the town courts and provide for the number of judges for each town, their classification and duties. The town justices are chosen by election but the legislature provides the terms, method of selection and method of filing any vacancies. N.Y. Const. art. VI, § 7(b)(d). The legislature has provided such regulations in the New York Uniform Justice Court Act ("UJCA"). *See, e.g.*, UCJA § 106 (McKinney's 1997). Complaints regarding the conduct of town justices are handled by the Commission on Judicial Conduct authorized by the New York State Constitution. N.Y. Const. art. VI § 21. Although each town is responsible for the salary of that town's justice, see New York Town Law § 27 (McKinney's 1997), the town justice and the town court are clearly part of the unified state court system, governed and regulated by the New York State Constitution and the legislature, and thus the town justice is not a municipal employee and the court is not a municipal entity. Accordingly, the municipality cannot be held liable for the conduct of the town court and town justice. Plaintiff's claims against the Town of Batavia therefore are dismissed with prejudice.

The Claims Against Defendants Friedman and Zicki

Plaintiff alleges that District Attorney ("D.A.") Friedman and A.D.A. Zickl violated his right under the First, Fifth and Fourteenth Amendments to the United States Constitution by the manner in which they prosecuted him. However, prosecutors performing traditional prosecutorial activities are given absolute

immunity in § 1983 suits. See Imbler v. Pachtman, 424 U.S. 409, 427-28, 96 S.Ct. 984, 993-94, 47 L.Ed.2d 128 (1976). "The absolute immunity accorded to government prosecutors encompasses not only their conduct of trials but all of their activities that can fairly be characterized as closely associated with the conduct of litigation or potential litigation, including presentation of evidence to a grand jury to initiate a prosecution ..., activities in deciding not to do so .... and conduct of plea bargaining negotiations ...." Barrett v. United States, 798 F.2d 565, 571-572 (2d Cir 1986), *citing* Lee v. Willins, 617 F.2d 320 (2d Cir.), *cert. denied*, 449 U.S. 861, 101 S.Ct. 165, 66 L.Ed.2d 78 1980); Dacey v. Dorsey, 568 F.2d 275, 278 (2d Cir.), *cert. denied*, 436 U.S. 906, 98 S.Ct. 2238, 56 L.Ed.2d 405 (1978); Taylor v. Kavanagh, 640 F.2d 450 (2d Cir. 1981).

The conduct plaintiff complains of that A.D.A. Zickl requested the issuance of the protective order and continued the prosecution against him, and that D.A. Friedman initiated and continued the prosecution against him and ratified the decisions made by Deputy Sheriff Vlack and A.D.A. Zickl falls squarely within the rubric of traditional prosecutorial activities for which the defendants are entitled to absolute immunity. Plaintiff's argument that A.D.A. Zickl's actions were investigatory rather than prosecutorial in nature because Zicki interviewed witnesses and wrote affirmations based upon their responses, is simply erroneous. The claims against defendants Zickl and Friedman hereby are dismissed with prejudice.

The § 1983 Conspiracy and Retaliation Claims

Plaintiff alleges that the actions of the defendants were part of a conspiracy to deprive him of his civil rights and were in retaliation for his complaints about the Sheriff's Department and A.D.A. Zickl. However, plaintiff's conclusory, vague and general allegations of a conspiracy are insufficient to state a cognizable claim under § 1983. Boddie v. Schnieder, 105 F.3d 857, 862 (2d Cir. 1997), *quoting* Leon v. Murphy, 988 F.2d 303, 311 (2d Cir. 1993) (citation and internal quotation marks omitted); Sommer v.

Dixon, 709 F.2d 173, 1 75 (2d Cir. 1 983) (per curiam), *cert. denied* 464 U.S. 857, 104 S.Ct. 177, 78 L.Ed.2d 158 (1983), *citing* Angola v. Civiletti, 666 F.2d 1, 4 (2d Cir. 1981) ("[a] complaint containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss"); Contemporary Mission, Inc. v. United States Postal Serv., 648 F.2d 97, 107 (2d Cir. 1981); *see also* Polur v. Raffe, 91 2 F.2d 52, 56 (2d Cir. 1990), *cert. denied*, 499 U.S. 937, 111 S.Ct. 1389, 113 L.Ed.2d 446 (1991); Zemsky v. City of New York, 82 F.2d 148, 151 (2d Cir.), *cert. denied*, 484 U.S. 965, 108 S.Ct. 456, 98 L.Ed.2d 396 (1987). Plaintiff's conspiracy claim therefore is dismissed with prejudice.

Plaintiff's retaliation claim must also be dismissed. According to plaintiff, he was prosecuted in July 1997 in retaliation for complaints he made against the Sheriff's Department and defendant A.D.A. Zickl in January 1995 and a complaint he made against the Sheriff's Department in June 1996. This conclusory claim of retaliation is insufficient to support a § 1983 action. "A claim of retaliation that is 'wholly conclusory' can be dismissed on the pleadings alone." Graham v. Henderson, 89 F.3d 75, 79 (2d Cir. 1996) (citations omitted); Albany Welfare Rights Organization Day Care Center v. Schreck, 463 F.2d 620, 623 (2d Cir. 1972), (dismissing plaintiff's retaliation claim "[mere conclusory allegations do not provide an adequate basis for the assertion of a claim for violation of these sections [42 U.S.C. § 1983 and 28 U.S.C. § 1343(3)1), *cert. denied*, 410 U.S. 944, 93 S.Ct. 1393, 35 L.Ed.2d 611 (1973). In addition, the passage of time - a year and more - between plaintiff's complaints and the alleged retaliation also demonstrates the insupportable nature of his claim. Cf. Colon V. Coughlin, 58 F.3d 865, 872 (2d Cir. 1995) ("temporal proximity between an inmate's lawsuit and disciplinary action may serve as circumstantial evidence of retaliation"). Finally, even if plaintiff's clams were not wholly conclusory, "[a] claim for retaliation cannot be sustained 'when the criminal prosecution was supported by probable cause.'" Duamutef v. Morris, 956 F.Supp. 1112, 1116 (S.D.N.Y. 1997), *quoting* Mozzochi v. Borden, 959 F.2d at 1179-80. The Court has already found that plaintiff's arrest and prosecution were supported by probable cause. Plaintiff's

retaliation claim hereby is dismissed with prejudice.

The Indemnification Agreement Claims

Plaintiff also challenges the constitutionality of the indemnification agreement entered into between Sheriff Maha and the County of Genesee by arguing that the agreement violates the provision of Article XIII § 13(a) of the New York State Constitution, which - according to plaintiff - states that a county cannot be made responsible for an act of the sheriff, and claims that his equal protection rights have been violated by the agreement. Plaintiff's reliance on this provision of the New York State Constitution is misplaced, however; the provision was withdrawn from the New York State Constitution on January 1, 1990. *See* N.Y. Const. art. XIII § 13(a) (McKinney's 1997). Plaintiff's equal protection claim also has no merit, given that it is based on his allegation that he is entitled to the protection of a provision of the New York State Constitution which is no longer in force. Accordingly, the indemnification agreement claims hereby are dismissed with prejudice.

The Municipal Liability Claim Against Genesee County

Although municipalities are considered "persons" for purposes of 42 U.S.C. § 1983, a local government such as Genesee County may be held liable under § 1983 only when the challenged action was performed pursuant to its custom or policy. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38, 56 L.Ed.2d 611 (1978). Thus, "[i]n order to establish the liability of a municipality in an action under § 1983 for unconstitutional acts by a municipal employee below the policymaking level, a plaintiff must show that the violation of his constitutional rights resulted from a municipal custom or policy." Gottlieb v. County of Orange, 84 F.3d 511, 518 (2d Cir. 1996). Municipalities are not subject to § 1983 liability solely on the basis of a *respondeat superior* theory. Collins v. City of Harker Heights, 603 U.S. 115, 121, 112 S.Ct. 1061, 1066-67, 117 L.Ed.2d 261

(1992); Monell, 436 U.S. at 694, 98 S.Ct. at 2037-38. Furthermore, it is not sufficient for plaintiff to simply demonstrate a single unconstitutional act by a non-policymaking employee. *See* City of Oklahoma v. Tuttle, 471 U.S. 808, 823-24, 105 S.Ct. 2427, 2436, 85 L.Ed.2d 791 (1985).

Plaintiff does not allege that the challenged actions occurred pursuant to a municipal custom or policy. Instead, he seeks to bypass this requirement by alleging that defendant Genesee County ("County") should be held municipally liable because the County is self-insured and as a result it has a financial disincentive to investigate allegations of misconduct against the Sheriff's Department and the District Attorney. While plaintiff's theory is creative, it nevertheless fails to state a cognizable constitutional claim against the County. Essentially, plaintiff's claim is that the municipality failed to investigate his claims against the Sheriff's Department and the defendant district attorneys. However a claim of failure to investigate under the circumstances alleged by plaintiff is not sufficient to state a cognizable claim. *See* Landrigan v. City of Warwick, et al., 628 F.2d 736, 747 (1st Cir. 1980) (municipality's failure to investigate isolated charge against a police officer not sufficient, by itself, to establish municipal liability); *but see* Battista v. Cannon, 934 F.Supp. 400, 404 (M.D.Fla 1996) (municipality's failure to investigate might be sufficient to state a cognizable claim where plaintiff had alleged that defendant Sheriff's Office "had de facto policies, as well as customs, which were the moving force behind the deprivation of her Constitutional rights"). In any event, the Court has found no constitutional violations and thus the issue of the County's liability does not arise. Dukes v. City of New York, 879 F.Supp. 335, 344 (S.D.N.Y. 1995) (municipality could not be held liable where it was found that the municipal employee had not committed any constitutional violations). Plaintiff's claims against the County therefore are dismissed with prejudice.

Plaintiff's Claims Against Sheriff Maha

To the extent that plaintiff sues Sheriff Maha in his official

capacity, plaintiff's claim is equivalent to a claim against the County and therefore is dismissed for the above reasons. Kentucky v. Graham, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985); Gottlieb v. County of Orange, 84 F.3d 511 (2d Cir. 1996).

To the extent that plaintiff sues Sheriff Maha in his individual capacity, plaintiff must demonstrate that Maha, in acting or failing to act, caused the alleged constitutional deprivation. Plaintiff's claim against Sheriff Maha is that the Sheriff failed to investigate the misconduct of his department and subordinates, and that he was grossly negligent in managing and supervising his deputies. The basis for both these claims is the allegedly false arrest of plaintiff by the Sheriff's deputies. However, as discussed above, plaintiff has no constitutional claim for false arrest here and thus he has no basis for his allegations against Sheriff Maha. Accordingly, all claims against Sheriff Maha are dismissed with prejudice.

The Pendent Claims

In view of the dismissal of all of plaintiff's federal claims, the Court declines to exercise pendent jurisdiction over the remaining state claims. United Mine Worker of America v. Gibbs, 383 U.S. 715, 727, 86 S.Ct. 1130, 1140, 16 L.Ed.2d 218 (1966); Diamond v. Am-Law Publishing Corp., 745 F.2d 142, 148 (2d Cir. 1984).

CONCLUSION

Plaintiff has met the statutory requirements of 28 U.S.C. § 1915(a). Accordingly, plaintiff's request to proceed *in forma pauperis* is hereby granted and, for the reasons discussed above, the complaint is dismissed with prejudice pursuant to 28 U.S.C. § 1915(e).

The Court hereby certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Order would not be taken in good faith, and leave to appeal to the Court of Appeals as a poor person is hereby

denied. Coppedge v. United States, 369 U.S. 438 82 S.Ct. 917, 8 L.Ed.2d 21 (1962). Further requests to proceed on appeal as a poor person should be directed, on motion, to the United States Court of Appeals for the Second Circuit, in accordance with Rule 24 of the Federal Rules of Appellate Procedure.

ORDER

IT HEREBY IS ORDERED, that the plaintiff's request to proceed *in forma pauperis* is granted;

FURTHER, that the complaint is dismissed with prejudice; and

FURTHER, that leave to appeal to the Court of Appeals as a poor person is denied.

SO ORDERED.

s/ William M. Skretny
United States District Judge

Dated: October 8, 1998
Buffalo, New York

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

KEITH G. GERRISH,

Plaintiff,

- v -

COUNTY OF GENESEE, NEW YORK;
GARY T. MAHA, Sheriff for Genesee County;
LAWRENCE FRIEDEMAN, Genesee County District Attorney;
WILLIAM G. ZICKL, Assistant District Attorney;
EDWARD E. VLACK, Deputy Sheriff;
WILLIAM FERRANDO Deputy Sheriff;
NATHAN BALDUF, Deputy Sheriff;
BERNARD J. RONAN, Town Justice, Town of Batavia; and
THE TOWN OF BATAVIA, NEW YORK;

Defendants.

DECISION AND ORDER
98-CV-0468A(M)
Filed: October 21, 1998
Entered: October 23, 1998

ARCARA, District Judge:

By Order filed October 13, 1998 (Docket # 14), and Judgment filed October 14, 1 998 (Docket # 15), plaintiff's motion to proceed as a poor person was granted but the complaint was dismissed with prejudice. The Court has now become aware that prior to the filing of the Order and Judgment dismissing the complaint, a clerical error led to the Court's erroneously issuing the summonses. As a result, plaintiff served his summons and complaint on each defendant despite the fact that the action was not properly commenced until either plaintiff paid the $150 filing fee or the

Court granted plaintiff's motion to proceed in forma pauperism See 28 U.S.C. §§ 1914 and 1915.

Because they were served with the summons and complaint, and because they were never sent copies of the dismissal order and judgment, most of the defendants have now either filed answers or motions to dismiss. Accordingly, the Clerk of the Court is directed to send a copy of the Order filed October 13, 1998 (Docket # 14) and the Judgment filed October 14, 1998 (Docket # 15), together with a copy of this order, to the Town of Batavia, 4165 West Main Road, Batavia, New York 14020, and the following attorneys:

John L. Rizzo, Esq.
Genesee County Attorney
Genesee County Building No. 1
Batavia, New York 14020

Jody E. Briandi, Esq.
Hurwitz & Fine, P.C.
1300 Liberty Building
Buffalo, New York 14202

Kevin D. Earl, Esq.
Rybak, Earl & Metzler, LLP
104 Bank Street
Batavia, New York 14020.

Defendant Ronan's motion to dismiss the complaint (Docket # 16) is dismissed as moot.

IT IS SO ORDERED.

s/ Richard J. Arcara
United States District Judge

Dated: October 21, 1998

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

KEITH G. GERRISH,

Plaintiff,

- v -

COUNTY OF GENESEE, NEW YORK;
GARY T. MAHA, Sheriff for Genesee County;
LAWRENCE FRIEDEMAN, Genesee County District Attorney;
WILLIAM G. ZICKL, Assistant District Attorney;
EDWARD E. VLACK, Deputy Sheriff;
WILLIAM FERRANDO Deputy Sheriff;
NATHAN BALDUF, Deputy Sheriff;
BERNARD J. RONAN, Town Justice, Town of Batavia; and
THE TOWN OF BATAVIA, NEW YORK;

Defendants.

DECISION AND ORDER
98-CV-0468A(M)
Filed: November 20, 1998
Entered: November 23, 1998

SKRETNY, District Judge:

By Order filed October 13, 1998 (item 14) (the "Order") and Judgment filed October 14, 1998 (item 15), the Court granted plaintiff's motion to proceed *in forma pauperis* and dismissed the complaint with prejudice. By Order filed October 21, 1998 (item 24), the Court directed the Clerk of the Court to send copies of the Order and Judgment to the defendants because plaintiff had served them before he had been granted *in forma pauperis* status.

Before the Court now are plaintiff's motion for reconsideration and

partial vacation of the Order and Judgment (items 25-27) and plaintiff's motion for reimbursement of the costs of service on the defendants (items 28-31).

Plaintiff brings his motion for reconsideration and partial vacation pursuant to Fed.R.Civ.P. 60b, which provides for such relief when, for example, there has been a mistake, inadvertence, surprise, excusable neglect, or newly discovered evidence which by due diligence could not have been discovered in time. Plaintiff's complaint was dismissed by the Order[1] pursuant to 28 U.S.C. §1915(e)(2)(B) because the complaint failed to state any claim upon which relief could be granted. Plaintiff's motion for reconsideration parses the Order in considerable detail and raises detailed objections to, inter alia, the Court's descriptions of his claims, the Court's characterization of the relevant legal standards, and the Court's application of the law to his claims.[2] However, the motion does not provide the Court with any of the Rule 60b grounds for reconsideration of its original decision and thus the Order stands. Plaintiff's motion for reconsideration is denied.

Rule 54(d) of the Federal Rules of Civil Procedure provides in pertinent part that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs ...." *See, e.g.*, Furman v. Cirrito, 782 F.2d 353 (2d Cir. 1986). Plaintiff is not the prevailing party in this action; in fact, the Court dismissed his complaint *sua sponte* for failure to state a single cognizable claim. Accordingly, plaintiff is not entitled to the reimbursement of his expenses pursuant to Rule 54(d). The Court finds no other authority for its awarding costs to a losing plaintiff, and therefore plaintiff's motion for costs is

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[1] Because the nineteen-page Order dealt in detail with plaintiff's numerous federal and state claims against the nine defendants, this order presumes familiarity with the Order.

[2] It appears that plaintiff is willing to concede the dismissal of "Counts XVI and XVII against the Town of Batavia," and possibly the dismissal of "Count XXIII." See Plaintiff's Motion, Item 26, ¶ 32.

denied.

CONCLUSION AND ORDER

For the above stated reasons, plaintiff's motions for reconsideration (item 26) and reimbursement of his costs (item 28) are denied. Because it appears that plaintiff served some or all of the defendants with these motions, the Clerk of the Court is directed to send a copy of this order to those defendants for whom the court has an address.

SO ORDERED.

s/ William M. Skretny
United States District Judge

Dated: November 20, 1998
Buffalo, New York

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 17 day of March one thousand nine hundred and ninety-nine,

KEITH G. GERRISH,

Plaintiff-Appellant,

v. 99-7041

Town of Batavia, et al.,

Defendants-Appellees.

Filed: March 17, 1999
Carolyn Clark Campbell, Clerk
United States Court of Appeals
For The Second Circuit

Appellant's request that his appellate brief be accepted for filing is granted. His request for an expedited appeal is granted as follows: appellees' briefs are to be filed by April 12, 1999 and the appeal will be heard no earlier than the week of April 26, 1999.

FOR THE COURT:

Carolyn Clark Campbell, Clerk

By: s/ Michael S. Zachary
Supervisory Staff Attorney

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

98-cv-468
WDNY
Arcara

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th **day of** September **one thousand nine hundred and ninety-nine.**

PRESENT:

HON. JOSEPH M. McLAUGHLIN,
HON. DENNIS JACOBS,
Circuit Judges,
HON. COLLEEN McMAHON,
District Judge.*

Filed: September 20, 1999
Karen Greve Milton, Acting Clerk
United States Court of Appeals
For The Second Circuit

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* The Honorable Colleen McMahon of the United States District Court for the Southern District of New York, sitting by designation.

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KEITH G. GERRISH,
Plaintiff-Appellant,

- v - **99 -7041**

TOWN OF BATAVIA, New York,
Defendant,

COUNTY OF GENESEE, et al,
Defendants-Appellees.

- -

APPEARING FOR APPELLANT:

Keith G. Gerrish, pro se, Batavia, NY

APPEARING FOR APPELLEES:

Andrea Schillaci, Hurwitz & Fine, P.C., Buffalo, NY, for Defendants- Appellees County of Genesee, Gary T. Maha, Edward E. Vlack, William Ferrando and Nathan Balduf.

John L. Rizzo, Genesee County Attorney, Batavia, NY, for Defendants-Appellees Lawrence Friedman and William G. Zickl.

Kevin D. Earl, Rybak, Earl & Metzler, LLP, Batavia, NY, for Defendant-Appellee Bernard J. Ronan.

Appeal from the United States District Court for the Western District of New York (Arcara, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment and order of the district court are **AFFIRMED.**

Keith G. Gerrish, pro se, appeals from a judgment dismissing his complaint brought pursuant to 42 U.S.C. § 1983 and an order denying his Fed. R. Civ. P. 60(b) motion. The district court dismissed the complaint under 28 U.S.C. § 1915(e) which permits a court to dismiss an action at any time if it is "frivolous" or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B)(i), (iii). We affirm for substantially the same reasons stated in its order of dismissal.

For the reasons set forth above, the judgment and order of the district court are hereby **AFFIRMED**.

FOR THE COURT,
Karen Greve Milton, Acting Clerk

By: s/ Lucille Carr, Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

KEITH G. GERRISH,

Plaintiff,

-v-

COUNTY OF GENESEE, NEW YORK; ET AL.,

Defendants.

ORDER
98-CV-0468A(M)
Filed: September 28, 1999
United States District Court, WDNY - Buffalo

ARCARA, District Judge:

Plaintiff Keith G. Gerrish commenced the instant action on July 27, 1998. On October 13, 1998, the Court dismissed the complaint *sua sponte*, with prejudice. Judgement was entered in favor of the defendants on October 14, 1998.

Plaintiff moved for reconsideration and vacation of the judgement on October 26, 1998. The Court denied the motion for reconsideration on November 20, 1998. On December 3, 1998, plaintiff again moved for reconsideration and to set aside the judgement.

On December 23, 1998, plaintiff filed a notice of appeal. On September 20, 1999, the Second Circuit affirmed the Court's October 13, 1998 Order dismissing the case.

Accordingly, plaintiff's motion for reconsideration filed December 3, 1998 (item No. 33) is moot and therefore denied. The Clerk of

the Court is directed to take all steps necessary to close this case.

IT IS SO ORDERED.

s/ Richard J. Arcara
United States District Judge

Dated: September 24, 1999

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, the City of New York, on the _____ day of December, one thousand nine hundred and ninety-nine.

KEITH G. GERRISH,
Appellant,

v. Dkt. No. 99-7041

COUNTY OF GENESEE,
Appellee.

Filed: December 2, 1999
Karen Greve Milton, Acting Clerk
United States Court of Appeals
For The Second Circuit

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant KEITH G. GERRISH.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON, Acting Clerk

By: s/ Beth J. Meador, Administrative Attorney

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUDGMENT IN A CIVIL CASE
CASE NUMBER: 98-CV-0468A(M)

Filed: October 14, 1998
United States District Court, WDNY - Buffalo

KEITH G. GERRISH

V.

COUNTY OF GENESEE, NY et al.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: that the plaintiff's request to proceed in forma pauperis is Granted; that the complaint is Dismissed with prejudice and that leave to appeal to the Court of Appeals as a poor person is Denied.

Date: October 14, 1998

RODNEY C. EARLY, CLERK

By: s/ Suzanne Grunzweig, Deputy Clerk